

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DALE R. SPIDAL,)	
)	
Plaintiff,)	
)	No. CV-08-505-HU
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social)	FINDINGS & RECOMMENDATION
Security,)	
)	
Defendant.)	
_____)	

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1 - FINDINGS & RECOMMENDATION

1 HUBEL, Magistrate Judge:

2 Plaintiff Dale R. Spidal brings this action for judicial
3 review of the Commissioner's final decision to deny disability
4 insurance benefits (DIB). This Court has jurisdiction under 42
5 U.S.C. § 405(g). I recommend that the Commissioner's decision be
6 affirmed.

7 PROCEDURAL BACKGROUND

8 Plaintiff applied for DIB on August 26, 2004, alleging an
9 onset date of January 1, 2004. Tr. 77-79. His application was
10 denied initially and on reconsideration. Tr. 65-69, 61-63.

11 On May 2, 2007, plaintiff, represented by counsel, appeared
12 for a hearing before an Administrative Law Judge (ALJ). Tr. 609-
13 42. On May 10, 2007, the ALJ found plaintiff not disabled. Tr.
14 13-26. The Appeals Council denied plaintiff's request for review
15 of the ALJ's decision. Tr. 7-10.

16 STANDARD OF REVIEW & SEQUENTIAL EVALUATION

17 A claimant is disabled if unable to "engage in any substantial
18 gainful activity by reason of any medically determinable physical
19 or mental impairment which . . . has lasted or can be expected to
20 last for a continuous period of not less than 12 months[.]" 42
21 U.S.C. § 423(d)(1)(A). Disability claims are evaluated according
22 to a five-step procedure. Baxter v. Sullivan, 923 F.2d 1391, 1395
23 (9th Cir. 1991). The claimant bears the burden of proving
24 disability. Swenson v. Sullivan, 876 F.2d 683, 687 (9th Cir.
25 1989). First, the Commissioner determines whether a claimant is
26 engaged in "substantial gainful activity." If so, the claimant is
27 not disabled. Bowen v. Yuckert, 482 U.S. 137, 140 (1987); 20
28 C.F.R. §§ 404.1520(b), 416.920(b). In step two, the Commissioner

2 - FINDINGS & RECOMMENDATION

1 determines whether the claimant has a "medically severe impairment
2 or combination of impairments." Yuckert, 482 U.S. at 140-41; see
3 20 C.F.R. §§ 404.1520(c), 416.920(c). If not, the claimant is not
4 disabled.

5 In step three, the Commissioner determines whether the
6 impairment meets or equals "one of a number of listed impairments
7 that the [Commissioner] acknowledges are so severe as to preclude
8 substantial gainful activity." Yuckert, 482 U.S. at 141; see 20
9 C.F.R. §§ 404.1520(d), 416.920(d). If so, the claimant is
10 conclusively presumed disabled; if not, the Commissioner proceeds
11 to step four. Yuckert, 482 U.S. at 141.

12 In step four the Commissioner determines whether the claimant
13 can still perform "past relevant work." 20 C.F.R. §§ 404.1520(e),
14 416.920(e). If the claimant can, he is not disabled. If he cannot
15 perform past relevant work, the burden shifts to the Commissioner.
16 In step five, the Commissioner must establish that the claimant can
17 perform other work. Yuckert, 482 U.S. at 141-42; see 20 C.F.R. §§
18 404.1520(e) & (f), 416.920(e) & (f). If the Commissioner meets its
19 burden and proves that the claimant is able to perform other work
20 which exists in the national economy, he is not disabled. 20
21 C.F.R. §§ 404.1566, 416.966.

22 The court may set aside the Commissioner's denial of benefits
23 only when the Commissioner's findings are based on legal error or
24 are not supported by substantial evidence in the record as a whole.
25 Baxter, 923 F.2d at 1394. Substantial evidence means "more than a
26 mere scintilla," but "less than a preponderance." Id. It means
27 such relevant evidence as a reasonable mind might accept as
28 adequate to support a conclusion. Id.

3 - FINDINGS & RECOMMENDATION

DISCUSSION

In his single page, handwritten, opening memorandum, plaintiff raises only one alleged error by the ALJ. Plaintiff contends that the ALJ inaccurately concluded that plaintiff was fired from his die caster job because of a positive urinalysis. Pltff's Mem. at p. 1 ("I was not fired for a positive U.A. but indeed had passed said test. . . . Judge Teivens [sic], the A.L.J. claims my dienial [sic] was due to a failed U.A. This is not true.").

The ALJ first noted an employer-required drug test in the part of his opinion discussing the severity of plaintiff's impairments at step two of the sequential analysis. Tr. 19. Specifically, the ALJ was discussing plaintiff's history of drug and alcohol abuse. Tr. 18-20. The ALJ noted that since his alleged onset disability date of January 1, 2004, plaintiff had been treated in the emergency room after falling at home while intoxicated. Tr. 19. He noted additional records showing that plaintiff had a positive drug screen performed while an inpatient at Kaiser Hospital in November 2004. Id. (citing Tr. 245-47, 420-23). The ALJ then noted that previously, plaintiff's employer "had to initiate surprise urinalysis." Tr. 19.

The ALJ's citation for this statement is an April 2007 letter written by plaintiff's parents which provides a chronology of events experienced by plaintiff, including "[o]ne night the company sent him to Milwaukie Providence Hospital to be tested for alcohol and drugs[.]" Tr. 150. The letter notes that the test came back negative. Id. This mention by the ALJ of an employer-mandated drug and alcohol test in no way amounts to a conclusion by the ALJ that plaintiff lost his job because of a failed urinalysis.

1 Rather, he simply cited this as one piece of evidence showing a
2 history of drug and alcohol tests, including one required by
3 plaintiff's employer.

4 The ALJ's only other mention of an employer-mandated
5 urinalysis is when he assessed the credibility of the statements by
6 plaintiff's parents in their April 2007 letter. Tr. 24. One of
7 the reasons the ALJ found the limitations described in the letter
8 as not credible, was because while plaintiff's parents noted the
9 employer-required surprise urinalysis, plaintiff's parents failed
10 to acknowledge that the testing was required because of plaintiff's
11 drug and alcohol abuse. Id. The ALJ gave the letter no weight
12 because the parents never acknowledged plaintiff's drug and alcohol
13 problem. As with the first reference, this reference does not
14 represent a finding that plaintiff lost his job because of a failed
15 urinalysis.

16 As a reading of the ALJ's decision makes clear, the ALJ denied
17 disability benefits not because plaintiff failed a urinalysis at
18 work, but because the record showed significant, and well-
19 documented, problems with drugs and alcohol, which the ALJ analyzed
20 properly under social security law. See Tr. 19 (noting materiality
21 analysis); see also Tr. 18-21 (discussing evidence of plaintiff's
22 drug and alcohol use); Tr. 18 ("[a]lcohol and significant marijuana
23 abuse has been present throughout his medical history, inclusive of
24 his hospitalizations"); Tr. 19 "[t]his is a clear case of alcohol,
25 marijuana and amphetamines abuse. . . . Records reflect he
26 continues to drink and use marijuana significantly and he has
27 consistently been diagnosed with 'alcohol dependence' and 'cannabis
28 (marijuana) dependence' through April 2007"); Tr. 19 ("examining

1 physicians all noted he is 'taking very limited responsibility in
2 addressing his alcohol abuse'); Tr. 19 (noting second arrest for
3 driving under the influence in March 2004); Tr. 20-21 (noting
4 January 2007 relapse after period of sobriety).

5 The record fails to substantiate plaintiff's claim of error by
6 the ALJ. The ALJ did not err.

7 CONCLUSION

8 I recommend that the ALJ's decision be affirmed.

9 SCHEDULING ORDER

10 The Findings and Recommendation will be referred to a district
11 judge. Objections, if any, are due August 7, 2009. If no
12 objections are filed, then the Findings and Recommendation will go
13 under advisement on that date.

14 If objections are filed, then a response is due August 21,
15 2009. When the response is due or filed, whichever date is
16 earlier, the Findings and Recommendation will go under advisement.

17 IT IS SO ORDERED.

18 DATED this 23rd day of July, 2009.

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20
21 /s/ Dennis James Hubel
22 Dennis James Hubel
23 United States Magistrate Judge
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